Supreme Court, U.S.
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No. 95-746

In The

Supreme Court of the United States

October Term, 1995

JAMES LINSCOMB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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STATEMENT

The Government incorrectly states "On Willey's advice petitioner directed the title company to change the papers and to create a second settlement statement indicating that the excess funds would go to another corporation, Foxhall, Inc., purportedly to pay off a second lien on the property." (Brief for the United States at 3) ("Govt. Brief"). There is no such testimony in the Record. On the contrary, Petitioner testified at trial that the "payoff second lien" notation was added without his knowledge or agreement. (Rec. Vol. 6, pp. 166, 196). Petitioner asked the closer to show on the settlement statement that a check from the loan proceeds would be made to Foxhall, Inc., (but not to pay off a second lien). (Rec. Vol. 5, pp. 93-94).

The Government also incorrectly states that the court of appeals held that petitioner's **false statement** was "clearly material". Govt. Brief 4. The opinion states that petitioner's **deception** was "clearly material." Pet. App. 7a.

The Government incorrectly asserts that petitioner's *Gaudin* claim was "belatedly raised by petitioner." Govt. Brief 5. This Court's decision in *Gaudin* was issued June 19, 1995. Petitioner's Letter Brief was filed in the court of appeals June 29, 1995. At that time, Petitioner's Motion for Rehearing was pending before the court of appeals; the *Gaudin* decision, and its applicability to this case, was brought to the attention of the court of appeals by Petitioner prior to any ruling on the Motion for Rehearing. Pet. App. 45a.

ARGUMENT

I.

THE GOVERNMENT'S PROPOSED CONSTRUCTION OF 18 U.S.C. § 1014 CONFLICTS WITH CIRCUIT PRECEDENT

Contrary to the Government's proposed construction of 18 U.S.C. § 1014, materiality is an essential element of the offense; therefore, *Gaudin* applies to a § 1014 conviction. Based upon *Gaudin*, the Eighth and Ninth Circuits reversed convictions under § 1014 where the issue of materiality had not been sent to the jury. See *United States v. Wells*, 63 F.3d 745 (8th Cir.) (reversing a § 1014 conviction for *Gaudin* error), *reh'g denied* (November 2, 1995); *United States v. Nash*, 64 F.3d 504 (9th Cir. 1995) (finding that *Gaudin* error was plain error and reversing a § 1014 conviction), *petition for reh'g en banc granted*.[1] Moreover, this Court granted certiorari in *Waldron v. United States*, 116 S.Ct. 333 (1995) (reversing a § 1014 conviction and remanding the case to the Fifth Circuit Court of Appeals for further consideration in light of *Gaudin*.)

After conceding in its Brief to the Fifth Circuit that materiality is an element of § 1014 (Govt. Fifth Cir. Brief 26, 29-30), the Government now claims that materiality is not an element of the offense. Govt. Brief 6. If the Government's altered position is correct, ten circuits are wrong. Moreover, no post *Gaudin* court has accepted the Government's analysis of § 1014. On January 31, 1996, the Government filed a Petition For A Writ Of Certiorari presenting that issue in *United States v. Wells*, 63 F.3d 745

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[1] Opinion withdrawn, (opinion filed February 6, 1996 after rehearing *en banc* reversing all Nash's convictions, including a § 1344 bank fraud conviction where the court decided materiality as a matter of law).

(8th Cir. 1995), petition for cert. pending, No. 95-1228 (filed Jan. 31, 1996). Govt. Brief 7, n. 4. The *Wells* court held that the trial court's determination of materiality denied the defendant's constitutional right to have a jury determine each and every element of a charged crime, including the materiality of a false statement charged under § 1014.

Contrary to the Government's arguments, this case would provide an appropriate vehicle to resolve that question because the issue was raised by the Government in this case in the court below, Pet. App. 5a, and was before the Fifth Circuit Court of Appeals on petitioner's Motion for Rehearing which was pending when *Gaudin* was decided by this Court. Although it had previously conceded that materiality was an element of the offense in the Fifth Circuit, the Government responded to *Gaudin* in the court of appeals by arguing that materiality was not an element of § 1014 and therefore *Gaudin* did not apply in this case. The Government argued that because materiality was a "judge made" limitation, it need not be submitted to the jury. Pet. App. 54a. The Fifth Circuit's opinion was silent with respect to the *Gaudin* decision, however, it is highly unlikely that the court of appeals was persuaded by the Government's proposed construction of § 1014. It would be appropriate for this Court to resolve that issue by granting plenary review of this case. Resolution of the issue by this Court would obviate the necessity of numerous courts of appeals' trying to reconcile the Government's § 1014 construction with prior circuit precedents, and with *Gaudin*.

II.

THE QUESTION LEFT OPEN IN *OLANO* AND RAISED BY THE GOVERNMENT IN THIS CASE – DOES PLAIN ERROR ANALYSIS APPLY WHERE ERROR UNCLEAR AT TRIAL BECOMES CLEAR ON APPEAL – WARRANTS A GRANT OF CERTIORARI

The Government claims that Linscomb's failure to object at trial makes this only a "plain error case," citing *United States v. Olano*, 113 S.Ct. 1770, 1775-1779 (1993). However, *Olano* specifically did not address the situation presented here, in which intervening law after the trial renders the trial proceedings erroneous. The Government's statement, Govt. Brief 8, n. 6, implying that the court of appeals did not have the opportunity to follow this Court's decision in *Gaudin* is erroneous. Although the court of appeals' decision in this case was issued before the *Gaudin* decision, this case was still pending before the court of appeals on a Motion for Rehearing at the time the *Gaudin* decision was issued. The Fifth Circuit could have granted rehearing in this case and addressed the *Gaudin* issues raised by Petitioner in support of his Motion for Rehearing. Under existing circuit precedent that materiality was an element of a false statement offense, it should have been clear and obvious to the Fifth Circuit that *Gaudin* required that issue to be decided by the jury and not the court.

The *Olano* Court noted that "[w]e need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." 113 S.Ct. at 1777. Such a "special case" is now before this Court and presents an appropriate vehicle to address the "clarified law" exception to

Olano. Moreover, this is the kind of error alluded to in *Olano* that should be presumed prejudicial whether or not there is a specific showing that the error "affected substantial rights." *Id.* at 1778. And even if a showing of "prejudice" is required, the fact that a rational jury could have resolved the materiality issue in favor of Petitioner established that Petitioner was harmed by failing to give the jury the opportunity to do so. Plenary review of these issues in this case would resolve this important and unanswered question of federal criminal and constitutional law.

The Government argues that the court's instructions on the false statement charge in this case preclude a finding that the false statement was "not material." Such a contention is without merit. Other instructions cannot serve as an acceptable substitute for the court's failure to submit "materiality" to the jury; the court's instructions to the jury on the false statement count did not obviate the constitutional proportion or impact of the *Gaudin* error claimed by petitioner and ignored by the court of appeals *post-Gaudin*.

III.

PETITIONER'S CONVICTION FOR § 1344 BANK FRAUD IS INVALID UNDER *GAUDIN* AND CONFLICTS WITH *UNITED STATES V. SEDA*

The court's instructions to the jury on the § 1344 Bank Fraud count, were tied to the false statement made the basis of the § 1014 conviction. The result was that the jury convicted Linscomb of bank fraud based upon a false statement which was not found to be material beyond a reasonable doubt by the jury. The § 1344 conviction is invalid under *Gaudin*.

In following the court's instructions on the bank fraud count, the jury could not avoid convicting Petitioner of a violation of § 1344 if it had found a violation of § 1014. The instructions charged the jury that the "scheme" and "artifice" elements of the offense included a "fraudulent . . . **representation**" [used to obtain money or property] "by defrauding a federally . . . insured financial institution;" or [obtaining money] by means of "**false** or fraudulent pretenses, **representations,** . . . " [emphasis supplied]. Thus, if the jury found a § 1014 False Statement violation, it would follow almost automatically that a § 1344 violation would be found as well. Petitioner claims that the same conduct, i.e., the false statement "payoff second lien," was the basis for both the § 1014 and the § 1344 charges against him. The issue here is not simply an overlap in the proof offered, as the Government contends. Govt. Brief 11.

The Government essentially argues that proof of a false statement intended to influence a loan decision under § 1014 is not sufficient for a conviction under the § 1344 bank fraud statute. Both § 1014 and § 1344 proscribe the use of deceptive means to procure loans from federally insured banks. While § 1014 requires proof of a material fact that is not required by § 1344 – a false statement or report on any loan application or similar document – the factual requirements of § 1344 will always be satisfied by conduct that violates § 1014 in the manner that Congress intended in enacting the statute. The *Blockburger* test is a means of ascertaining whether the two offenses are sufficiently distinguishable from one another so that it is reasonable to infer that Congress intended to authorize multiple punishments. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Sections 1014 and

1344 are not sufficiently distinguishable to draw such an inference.

To prove a violation of § 1014, it must be shown that a false statement was made to influence the actions of the bank. Such proof will always constitute a scheme or artifice to defraud a bank in violation of § 1344, except arguably in the extremely narrow situation hypothesized by the Government and rejected by the Second Circuit in *United States v. Seda*, 978 F.2d 779 (2d Cir. 1992) – where a person makes a false statement on a loan application to insure its rejection. Congress specifically considered the reach of § 1014 and chose to enact § 1344 not to provide a separate offense for multiple punishment of conduct already covered by § 1014, but rather to create a federal offense to punish conduct beyond the reach of § 1014. *See Legislative History to Public Law* 98-473, 98th Congress, Second Session, 1984 *United States Code Congressional and Administrative News*, p. 3518. Since § 1014 and § 1344 were "addressed to the same concerns and designed to combat the same problem," *Simpson v. United States*, 435 U.S. at 10 and 15, it must be assumed that Congress did not intend multiple punishments under these two statutes. *See id.*

Congress's purpose in enacting § 1344 was to punish conduct not covered by § 1014 and not to provide a vehicle to obtain multiple convictions and punishments for conduct that is punishable by § 1014. If the legislative history leaves any doubt that this was Congress's intent, the rule of lenity dictates that ambiguity be resolved so as to not allow multiple convictions and punishment for conduct that violates both § 1014 and § 1344. *See Albernaz v. United States*, 450 U.S. at 342; *Whalen v. United States*, 445 U.S. at 694; *Simpson v. United States*, 435 U.S. at 14-15.

The Fifth Circuit distinguished *Seda* in this case on the grounds that the acts constituting the § 1014 violation were not the "sole basis" of the § 1344 conviction. This "sole basis" test is invalid under the reasoning of *Blockburger, supra,* and *Whalen, supra.* The Government in this case simply disagrees with the Second Circuit's holding in *Seda,* citing the dissenting opinion in that case as support for its position. Govt. Brief 12.

The Fifth Circuit's decision conflicts with the Second Circuit's decision in *Seda* and independently of Petitioner's contentions under *United States v. Gaudin,* this Court should grant certiorari to resolve this conflict.

CONCLUSION

Certiorari should be granted. Either plenary review, or a remand in light of *Gaudin,* should be accorded.

Respectfully submitted,

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